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Supreme Court, U.S.
FILED
JUL 26 1994
OFFICE OF THE CLERK

No. 93-1993

In The

Supreme Court of the United States

October Term, 1994

IN RE WELLS FARGO SECURITIES LITIGATION

WELLS FARGO & CO., et al.,

Petitioners,

vs.

HOWARD GREENWALD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS AMICI CURIAE

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8 pp

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Respondents oppose the request of the American Bankers Association ("Bankers Association") and the joint request of the American Electronics Association ("AEA") and the Association of Publicly Traded Companies ("APTC") to file briefs as *amici curiae* in this case. Under Supreme Court Rule 37.1, the filing of an *amicus* brief is "not favored" unless the brief "brings *relevant* matter to the attention of the Court *that has not already been brought to its attention by the parties* . . . . " (Emphasis added.)

The proposed Bankers Association submission purports to discuss the legal issues in the case "from a perspective broader than that of the immediate parties to the case." Bankers Association Motion for Leave to File Brief at 2. It is difficult to see why the interests of the banking industry, which the Bankers Association seeks to foster, would not be adequately represented by the principal defendant in this action, a bank. What seems intuitively obvious is borne out by the Bankers Association's proposed brief, which merely rehashes the same arguments already raised by petitioner Wells Fargo. For that reason, the motion by the Bankers Association should be denied.

The proposed AEA/APTC submission is even more objectionable. It does not even attempt to limit itself to a discussion of the legal issues in the case. Rather, it consists largely of arguments currently being advanced by those political interests lobbying Congress to amend the Securities Exchange Act of 1934. Such blatantly partisan advocacy has its place in the legislative arena; it does not belong in a brief before this Court on a case involving the application of pleading standards found in the Federal Rules of Civil Procedure. To the extent the proposed brief contains any relevant material, it has already been submitted to this Court by the parties.

In an attempt to provide some legitimacy for the AEA/APTC brief, would-be *amici* begin with a citation to the recent decision in *Shields v. Citytrust Bancorp, Inc.*, No. 93-7738, 1994 U.S. App. LEXIS 13465 (2d Cir. June 2, 1994). AEA/APTC Proposed Brief Amici Curiae (hereafter "Proposed Brief") at 4. Although alerting the Court to a relevant case not cited by the parties would be an appropriate role for *amici*, *Shields* was already cited and

discussed in Respondents' Brief in Opposition (at 11-12 n.8). Indeed, the precise language of the Second Circuit's conclusion relied on in the Proposed Brief (at 5) was also quoted by respondents. Petitioners will have the opportunity to file a reply brief in which they can discuss *Shields*. Accordingly, the brief discussion of the *Shields* decision in the AEA/APTC submission is simply unnecessary to this Court's proper consideration of this case.

Having begun with a facially proper but ultimately unnecessary point, the bulk of the AEA/APTC brief degenerates into a political diatribe against securities class actions generally. Emphasizing statements marshalled by proponents of recent efforts to amend the federal securities laws, without reference to the overwhelming amount of contrary evidence,[1] the proposed

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[1] The movement toward greater protection for defendants is neither a "consensus" nor "informed." Proposed Brief at 3. For instance, the AEA/APTC brief asserts "the need to deter unmeritorious 'strike' litigation." *Id.* Even according to conservative scholars, however, "[m]ost observers agree that strike suit litigation is relatively uncommon." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 78 (1991). The brief also argues that securities fraud cases are "blithely filed on a near automatic basis in response to any stock market misfortune" (Proposed Brief at 3) and characterizes the class action lawsuit as an "almost . . . Pavlovian response to a declining stock price." Proposed Brief at 16. No empirical support is cited for these assertions and, indeed, the available hard data clearly refutes them. In a study submitted to the National Economic Council, the number of one-day stock price drops of 10 percent or greater was calculated and compared with the number of public companies sued in securities fraud class action lawsuits. For the last four years (1989-1992), there were 17,091 such price drops. During that same

amici seek to aggrandize the importance of this case by dragging the Court into a political debate. As the citations in the AEA/APTC brief make clear, that debate belongs in Congress and not this Court. The presentation of this case, which involves the application of an undisputed legal standard to the facts alleged in a particular pleading, does not benefit from the addition of such irrelevant and obviously partisan arguments.

Because the proposed submissions failed to add any substance to the issues before this Court, respondents request that both motions for leave to file *amicus* briefs be denied.

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period of time, only 484 public companies were sued in securities class action lawsuits, a rate of 2.8 percent. National Association of Securities & Commercial Law Attorneys, Incidence and Economic Impact of Securities Class Action Lawsuits 22 (1994). Finally, proposed *amici* complain loudly about the "excessive numbers of securities fraud cases" (Proposed Brief at 3), at the same time as the enforcement chief of the SEC is stating that "the 'litigation explosion' in securities cases, as described by defendants, doesn't exist." Edward Felsenthal, *SEC On "Explosion" of Suits*, Wall St. J., June 18, 1993, at B4. The AEA/APTC brief fails to point out that over the past 20 years, figures from the Administrative Office of the United States Courts show a slight *decrease* in the number of securities class actions filed. This is particularly significant in light of the fact that over the same time period, every indicator of stock market activity showed exponential growth. *See, e.g.*, Search of Common Stock Database, Securities Data Company, New York, NY (initial public offerings – 9000% increase; common stock offerings – 1200% increase); NYSE and NASDAQ Fact Books (1985-1994) (NYSE share volume – 1800% increase; NASDAQ share volume – 5500% increase).

The purpose of these examples is not to debate the merits of statutory securities law reform. The point is simply that the AEA/APTC brief presents only one side of a very political story which is irrelevant to the narrow legal issue currently before the Court.

Dated: July 26, 1994

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